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No. 99-1341

Supreme Court, U.S.
FILED

2000

CLERK

In the Supreme Court of the United States

VAN NESS ASSOCIATES, LTD.,

Petitioner,

v.

THE MITSUBISHI BANK, LTD., DRESDNER BANK AG, CAISSE NATIONALE DE CREDIT AGRICOLE, INSTITUTO BANCARIO SAN PAOLO DI TORINO, FOREIGN BANKING CORPORATIONS; AND 1650 MISSION ASSOCIATES, LTD., A LIMITED PARTNERSHIP,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review an unpublished decision of the California court of appeal that decided only state law issues.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Van Ness Associates, Ltd., was plaintiff and appellant in the courts below. Respondents The Mitsubishi Bank, Ltd., Dresdner Bank AG, Caisse Nationale De Credit Agricole, Instituto Bancario San Paolo Di Torino, and 1650 Mission Associates Ltd., were defendants and respondents in the courts below. Bank of California National Association, Richard I. Deringer, and Thomas A. Leary were also defendants and respondents in the courts below.

The Mitsubishi Bank, Ltd. is now known as The Bank of Tokyo - Mitsubishi, Ltd. It has no parent company and no publicly held company owns 10% or more of its shares.

Caisse Nationale De Credit Agricole has no parent company and no publicly held company owns 10% or more of its shares.

Instituto Bancario San Paolo Di Torino is now known as SANPAOLO IMI S.p.A. One company owns 10% or more of its shares: Compagnia di Sanpaolo owns 16.1%.

Dresdner Bank AG has three shareholders whose ownership stake is 10% or more: Allianz AG owns 22.4%; GF Frankfurter Gesellschaft fuer Finanzwerte mbH owns 10.05%; and Vermo Vermoegensverwaltungsgesellschaft mbH owns 10.0%.

1650 Mission Associates, Ltd. is a single purpose entity established by subsidiaries of the above four banks to hold title in the subject property. It has no parent, and each bank's respective subsidiary owns a percentage equal to its percentage of the subject loan participation.

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RESPONDENTS' BRIEF IN OPPOSITION

Nothing in this case warrants review by this Court. Petitioner filed this action in state court alleging state law fraud claims and various challenges under state law to a nonjudicial foreclosure. Neither the complaint nor respondents' answer asserted any rights under federal law. The state trial court dismissed petitioner's claims as time-barred and meritless. The California court of appeal affirmed in an unpublished opinion, and the California Supreme Court denied review without opinion.

Petitioner now seeks review in this Court on the theory that its Due Process rights under the Fourteenth Amendment were violated. The petition should be denied because the alleged federal issues have been waived and because they do not in any event present any issue worthy of this Court's review.

A. Petitioner's Alleged Federal Issues Have Been Waived.

Petitioner waived any Due Process claim by failing to timely raise it in the courts below. The first time petitioner asserted a Due Process claim was in its petition for review to the California Supreme Court. Petitioner did not assert any constitutional claim in the state trial court, which by itself was a waiver under state law that precludes review in this Court. *Beck v. Washington,* 369 U.S. 541, 549-53 (1962); *North Coast Business Park v. Nielsen Construction Co.,* 17 Cal. App. 4th 22, 28-29, 21 Cal. Rptr. 2d 104 (1993). Similarly, in the California court of appeal, petitioner referred to a possible constitutional issue only in passing in its reply brief, without identifying what constitutional right it was invoking or whether it existed under the state or federal constitution. Such an undifferentiated reference to constitutional principles is insufficient to preserve any federal issue for review in this Court, even if the issue had not already been waived by petitioner's failure to raise it in the trial court. *See Bankers*

Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78 (1988). Petitioner's constitutional arguments are nothing but an afterthought, asserted only as a vehicle to prolong this suit after petitioner lost its state law claims. They do not support review by this Court.

B. Petitioner's Purported Federal Claims Do Not In Any Event Justify Review.

Even if petitioner's purported federal claims had not been waived, they are frivolous.

1. This case does not involve any constitutional issue regarding collections in excess of the amount owed.

Petitioner first asserts that the Due Process Clause prohibits lenders from collecting "more than payment in full" on their loan. Pet. 6. Even if that were true, however, it would not help petitioner. Petitioner's own complaint establishes that respondents did not collect more than payment in full. At the time of the foreclosure sale, petitioner owed $46.4 million on its loan. Pet. App. 5. According to petitioner, respondents collected $22.5 million at the foreclosure sale and additionally had collected a net amount of $11.5 million in rents, for a total of $34 million, leaving a shortfall of more than $12 million. Pet. App. 5, 19. Petitioner asserts that the property actually should have been valued at $33.25 million in the foreclosure. Pet. 4. But even if that were true, that still would leave a shortfall of close to $2 million after application of the rents.

The facts of this case thus do not present the issue posited by petitioner, and the unpublished decision of the court of appeal below accordingly does not address it. Instead, the court simply held that respondents' collection of the rents did not violate the "security first" rule of the California statutes governing nonjudicial foreclosure. Pet. App. 14-18. Certiorari is unquestionably inappropriate on this state law ruling.

2. The California court did not apply any statute retroactively.

Petitioner also tries to manufacture a federal issue by asserting that the state court violated Due Process by retroactively applying a recent amendment to California Civil Code section 2938. Pet. 8. This contention is also frivolous. The California court did not apply the amended statute retroactively. Instead, it decided the case under the prior version of the statute in effect at the time of the foreclosure, holding that that statute permitted a lender to collect rents without thereby forfeiting its right to also foreclose on the real property. The court's only comment on the amended statute was to reject petitioner's assertion that the amendment showed that the court's interpretation of the prior statute was erroneous. Pet. App. 17-18. Again, this ruling was purely one of state law. It provides no ground for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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